IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. **ELIJAH SHIRLEY,** **MAYNARD SHIRLEY**, and **MICHAEL SHIRLEY,** Defendants.	)	Cr. No. 15-CR-1285 JB

UNITED STATES' MOTION IN LIMINE/NOTICE OF INTENT TO USE EVIDENCE UNDER RULE 609 OF THE FEDERAL RULES OF EVIDENCE

COMES NOW the United States of America, by and through its attorneys, Damon P. Martinez, United States Attorney for the District of New Mexico, Niki Tapia-Brito and Nicholas Marshall, Assistant United States Attorneys for said District, and hereby gives notice of its intent to impeach Defendant's credibility under Rule 609 if he testifies at the trial.

DEFENDANTS' FELONY CONVICTIONS

ELIJAH SHIRLEY

The Defendant ELIJAH SHIRLEY has one felony conviction admissible pursuant to Fed. R. Evid. 609(a)(1). ELIJAH SHIRLEY was convicted in **D-1116-CR-2010-00270**, **in San Juan County, in the Eleventh Judicial District Court, in the state of New Mexico** for the offense of **Aggravated Driving While Intoxicated, a fourth degree felony**. Defendant Elijah Shirley pled and was convicted on June 28, 2010.

The aforementioned conviction for ELIJAH SHIRLEY is within the ten (10) year time limit for the purpose of Rule 609 of the federal rules of evidence. The United States seeks to use the above-referenced conviction under Rule 609. This Notice may be amended as further information is obtained.

MAYNARD SHIRLEY

The Defendant MAYNARD SHIRLEY has two felony convictions admissible pursuant to Fed. R. Evid. 609(a)(1):

a) Defendant MAYNARD SHIRLEY was found guilty after a trial by jury in **CR 2002-097043**, **in Maricopa County, Superior Court, in the state of Arizona** of the offense of **Aggravated Assault, a class 3 felony**, designated dangerous and non-repetitive, arising from an incident occurring on August 27, 2001. On February 4, 2003, Defendant was sentenced to a term of imprisonment and committed to the Arizona Department of Corrections on Count 1 for nine (9) years. Defendant received credit for 159 days presentence confinement time.

b) Defendant MAYNARD SHIRLEY pled guilty in case **S-0900-CR-0020040390 in Navajo County, Superior Court, in the state of Arizona** for the offense of **Talking the Identity of Another, a class four felony**, occurring on or about May 17, 2002. Defendant was sentenced to a term of three years in the Arizona Department of Corrections, and to a term of five months community supervision consecutive to the term of imprisonment. The United States submits that the conviction concerning the offense of Taking the Identity of Another is admissible under Fed. R. Evid. 609(a)(1) and (2), as the conviction is both a conviction for a felony and a crime of dishonesty. Defendant was given credit for zero days served prior to sentencing and the sentence was to be served consecutive to the Maricopa County case CR 2002-097043, *see supra*. Defendant was released from the Arizona Department of Corrections on

January 10, 2013, and discharged on September 12, 2014.

The aforementioned convictions are within the ten (10) year time limit for the purpose of Rule 609 of the federal rules of evidence. The United States seeks to use the above-referenced conviction under Rule 609. This Notice may be amended as further information is obtained.

DEFENDANTS' CRIMES INVOLVING DISHONESTY

ELIJAH SHIRLEY

Defendant ELIJAH SHIRLEY has one conviction for a crime involving dishonesty or moral turpitude in case number **M-47-VR-2009-00118**. Defendant pled guilty and was convicted of the offense of **Concealing Identity in the Farmington Magistrate Court, Eleventh Judicial District, and State of New Mexico on June 23, 2009**. The United States seeks to use the above-referenced conviction under Rule 609(a)(2). This Notice may be amended as further information is obtained.

MAYNARD SHIRLEY

Defendant MAYNARD SHIRLEY was convicted of a felony in **S-0900-CR-0020040390 in Navajo County, Superior Court, in the state of Arizona** for the offense of **Talking the Identity of Another, a class four felony,** listed *supra*. The United States submits that the offense is also a crime of dishonesty and admissible pursuant to Rules 609(a)(1) and (2). This Notice may be amended as further information is obtained.

MICHAEL SHIRLEY

Defendant MICHAEL SHIRLEY has one conviction for a crime involving dishonesty or moral turpitude in case number: **M-147-VR-2011-00148**. Defendant pled guilty and was convicted of the offense of **Concealing Identity in the Aztec Magistrate Court, Eleventh Judicial District, and State of New Mexico on October 25, 2011**. The United States seeks to use the above-referenced conviction under Rule 609(a)(2). This Notice may be amended as further information is obtained.

DISCUSSION

Rule 609 of the Federal Rules of Evidence states in part that: evidence that a witness other than an accused is convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused is convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. F.R.E. 609(a)(1) (emphasis added). Rule 609 further states that convictions that are more than ten years old are inadmissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." F.R.E 609(b).

Accordingly, a court must conduct a balancing test concerning evidence that an accused has been convicted of a felony crime. If the conviction is within ten years, a mere balancing test of probative value versus prejudicial effect must be conducted. Convictions outside the ten-year window are admissible if a court determines that the probative value substantially outweighs its prejudicial effect. Evidence of a defendant's prior conviction will therefore be admitted if it survives the 609 balancing test. *United States v. Lugo*, 170 F.3d 996, 1005 (10th Cir. 1999). While explicit findings that the balancing of probative value against prejudicial effect are not an absolute requirement, an appellate court must be satisfied that the balancing test was in fact performed. *See United States v. Howell*, 285 F.3d 1263, 1269 (10th Cir. 2002). Substantial deference is given to the district court under Rule 609, with decisions being reviewed only for an abuse of discretion. *United States v. Lugo*, 170 F.3d at 1005 (internal citation omitted).

Although it is improper for the prosecution to probe into the specific details of the crime, cross-examination into the nature of an accused's felony convictions has been recognized as being within Rule 609's limits. *See United States v. Howell*, 285 F.3d 1263, 1266 (10th Cir. 2002) ("cross-examination should be confined to a showing of the essential facts of convictions, *the nature of the* the crimes, and the punishment.") (quoting *United States v. Albers*, 93 F.3d 1469, 1479-80)(10th Cir. 1996) (quoting *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977) (emphasis in original).

The aforementioned felony convictions for Defendants ELIJAH, MAYNARD and MICHAEL SHIRLEY are within the ten (10) year time limit for the purpose of Rule 609 Fed. R. Evid. The Defendants felony convictions addressed herein are subject to the ordinary balance test of Rule 609(a)(1). The United States submits that the probative value, if the Defendants elect to testify, outweighs the prejudicial effect of the introduction of such evidence because the jury is unable to fully evaluate any Defendant's credibility as a witness unless Defendant is impeached with their prior convictions.

Under Rule 609(a)(2), a witness may be impeached by a showing that he has been convicted of a crime involving dishonesty or false statement, regardless of the punishment. This applies to all witnesses, and (except for remote convictions) the court may not invoke a balancing test to foreclose such impeachment. *United States v. Harper*, 527 F.3d 396, 408 (5th Cir. 2008), cert. denied, 555 U.S. 891 (2008).

This notice is not intended to limit the United States' ability to offer the evidence of these felony convictions for other bases including, but not limited to, the need to test evidence offered by the defense under Rules 404(a)(1), 405, 406, and 608 of the Federal Rules of Evidence and/or to use as impeachment evidence by the United States under Rules 801(d) of the Federal Rules of

Evidence. The United States retains the right to amend this notice as further information is obtained.

CONCLUSION

All of Defendants' prior felony convictions set forth in this Notice occurred within the past ten (10) years. Additionally, each of the other listed offenses constitute crimes of dishonesty which are admissible pursuant to Rule 609(2)The United States requests that this Court allow the use of the felony convictions set forth in this Notice as permissible impeachment evidence under Rule 609.

Respectfully submitted,

DAMON P. MARTINEZ
United States Attorney

Electronically filed on 08/29/16
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I hereby certify that on August 29, 2016, I
Filed the foregoing electronically through
The CM/ECF system, which caused counsel
counsel of record for the Defendants: Michael
Keefe and Aric Elsenheimer; Theresa Duncan;
and Charles Fisher to be served by electronic
Means as more fully reflected on the Notice of
Electronic Filing

Electronically filed on 8/29/16
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